

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GARRETT HOFFMAN,
CDCR #F-39330,

Plaintiff,

D. KHATRI, et al.,

Defendants.

Civil No. 09-0172 DMS (RBB)

**ORDER PROVIDING PLAINTIFF
NOTICE OF DEFENDANT
TETTEH'S MOTION TO
DISMISS PURSUANT TO
WYATT v. TERHUNE AND
SETTING BRIEFING
SCHEDULE**

On November 25, 2009, Defendant Tetteh filed a Motion to Dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b) and 12(b)(6) [Doc. No. 26].¹ On December 1, 2009, Defendant Navamani filed a separate Motion to Dismiss pursuant to FED.R.CIV.P. 12(b)(1) and 12(b)(6) [Doc. No. 27].

I. Defendant Tetteh's Motion to Dismiss – *Wyatt* Notice

In his Motion to Dismiss, Defendant Tetteh claims that Plaintiff's Complaint fails to state an Eighth Amendment inadequate medical care claim against him *and* that Plaintiff has failed to exhaust his administrative remedies before filing suit as is required by 42 U.S.C. § 1997e(a). See Mem. of P&A's in Supp. of Def. Tetteh's Mot. [Doc. No. 26-1] at 7-16.

¹ A third Motion to Dismiss pursuant to FED.R.CIV.P. 12(b)(6) filed by Defendant Lai on October 1, 2009 [Doc. No. 21] does not raise exhaustion arguments and will be addressed in a separate Order.

1 While non-exhaustion under § 1997e(a) is an affirmative defense which Defendant has
 2 the burden of raising and proving, *Jones v. Bock*, 549 U.S. ___, 127 S. Ct. 910, 919 (2007), “[i]n
 3 deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look
 4 beyond the pleadings and decide disputed issues of fact.” *Wyatt v. Terhune*, 315 F.3d 1108,
 5 1119-20 (9th Cir. 2003) (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837
 6 F.2d 365, 369 (9th Cir. 1988) (per curiam)). If the court looks beyond the pleadings when
 7 deciding a motion to dismiss for failure to exhaust, “a procedure closely analogous to summary
 8 judgment,” the Court “must assure that [the plaintiff] has fair notice of his opportunity to
 9 develop a record.” *Id.* at 1120 n.14; *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir.
 10 2009) (remanding case to district court where court failed to “effectively give [plaintiff] fair
 11 notice that he should have submitted evidence regarding exhaustion of administrative
 12 remedies.”).

13 Accordingly, the Court notifies Plaintiff that Defendant Tetteh has asked the Court to
 14 dismiss his case *in part* because he failed to exhaust administrative remedies pursuant to 42
 15 U.S.C. § 1997e(a). While the Court may not “look beyond the pleadings” in this case, Plaintiff
 16 is advised of his opportunity to develop a record and to include in his Opposition to Defendant
 17 Tetteh’s Motion whatever arguments and documentary evidence he may have to show that he
 18 did, in fact, exhaust all administrative remedies as were available to him prior to filing suit. *See*
 19 *Wyatt*, 315 F.3d at 1119-21; *Marella*, 568 F.3d at 1028.

20 **II. Conclusion and Order**

21 Accordingly, **IT IS ORDERED** that:

- 22 1) Plaintiff is hereby provided with the notice required by *Wyatt v. Terhune*, 315
 F.3d 1108, 1119-20 (9th Cir. 2003) and an opportunity to present evidence of
 exhaustion in response.
- 23 2) Plaintiff, if he chooses, may file an Opposition to both Defendant Navamani and
 Defendant Tetteh’s Motions to Dismiss [Doc. Nos. 26, 27], including any
 documentary evidence of administrative exhaustion he may be able to provide in

1 response to Defendant Tetteh's Motion, and serve it upon each Defendant's
2 counsel of record no later than **Friday, January 29, 2010**.

- 3) If Plaintiff files an Opposition, both Defendant Navamani and Defendant Tetteh
4 may each file a Reply and serve it upon Plaintiff no later than **Friday, February
5, 2010**.

6 The Court will consider both Defendant Navamani and Defendant Tetteh's Motions fully
7 briefed as submitted on the papers as of **Friday, February 12, 2010**, and will thereafter issue
8 a written Order ruling on both Defendants' Motions without requiring any appearances or
9 holding any oral argument pursuant to S.D. CAL. CIVLR 7.2(d)(1).

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11 DATED: December 2, 2009



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13 HON. DANA M. SABRAW
United States District Judge
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